

NOT DESIGNATED FOR PUBLICATION
DIVISION II

ARKANSAS COURT OF APPEALS
SAM BIRD, JUDGE

CA06-623

FEBRUARY 21, 2007

PAUL CULBREATH, d/b/a SOUTHERN
SIDING & CONSTRUCTION CO.

APPELLANT

v.

TROY SUMMERFIELD

APPELLEE

AN APPEAL FROM CRAIGHEAD COUNTY
CIRCUIT COURT

[NO. CV05-419]

HONORABLE DAVID LASER,
CIRCUIT JUDGE

AFFIRMED

In this case involving breach of a construction contract, the trial court awarded appellee Troy Summerfield \$7567.98 in damages and \$3000 in attorney fees against appellant Paul Culbreath d/b/a Southern Siding & Construction Company. Culbreath now brings this *pro se* appeal. We affirm.

In July 2004, Culbreath drafted a \$7500 proposal for various repair and remodeling jobs on Summerfield's home. The jobs included installing a french drain around the front of house; digging down and re-sealing the block walls on the front side of the home and the inside of the foundation where needed; tearing out and removing sidewalks and the front porch stoop; building a new retaining wall along the driveway; and replacing fascia boards and gutters. According to Summerfield, the work was to be completed in two weeks. He further said that the parties understood that the sidewalks and the front porch stoop would

be replaced after the drain was completed and that the fascia boards and gutters would be replaced around the entire house. Payment was to be made in three draws of \$2500 each, the first of which Summerfield paid on July 10.

Shortly after the proposal was signed, Culbreath asked for another \$1500 draw, saying that he could not start work until he paid the excavation contractor. Summerfield, who was living in St. Louis by that time, reluctantly paid the \$1500 in August 2004.

In September 2004, Summerfield returned to Jonesboro and viewed the house. He observed that the work was far from complete, and he contacted Culbreath, who said he had suffered a heat stroke but could return to work in a couple of weeks. Thereafter, Summerfield was unable to reach Culbreath again. In October 2004, he managed to contact Culbreath's son, Jeff, who said that his father had suffered a heart attack. Jeff agreed to try and complete the job. But, by December 2004, very little additional work was done, and, according to Summerfield, what work had been done was far from satisfactory. Few gutters had been replaced and most of the fascia boards were either improperly installed or left unpainted. The retaining wall had a large crack in it, and the adjacent driveway was patched in an unattractive manner. No trench had been dug for the french drain, but the front porch and stoop had been removed and left in a heap of rubble in the front yard. Water had seeped into the crawl space.

When Summerfield could no longer get in touch with either of the Culbreaths, he completed the work by his own means. According to his testimony and exhibits, he spent, in addition to the \$4000 he had already paid Culbreath, approximately \$3400 in repairs, plus

\$3567.98 over and above the contract price to install the french drain and replace the stoop, gutters, and fascia boards.

On July 15, 2005, Summerfield sued Paul Culbreath d/b/a Southern Siding & Construction Co. for breach of contract and attorney fees. A bench trial began on January 19, 2006, with Summerfield testifying and Culbreath cross-examining him, *pro se*. At the close of Summerfield's testimony, a lunch recess was taken. During the recess, Culbreath's daughter called the court and said that Culbreath had been taken to the hospital with chest pains. The court decided to postpone the remainder of the trial to February 8, 2006, a date that court personnel later cleared with Culbreath. However, when the case was called on February 8, Culbreath did not appear. The court, based on Summerfield's prior testimony and a summary of damages he presented, awarded him \$7567.98 plus \$3000 in attorney fees. Judgment was entered on February 8, 2006.

On March 3, 2006, Culbreath filed a "Motion to Rescind Order and Judgment." He claimed that he had not appeared on February 8 due to car trouble, and he attached what purported to be an invoice for replacing his fuel pump. The motion also stated that "a call was made to the Court Clerk's Office on February 8, 2006 so to inform the Court of the unfortunate delay on Culbreath's behalf for not being present at the hearing which was certainly not done deliberately." The trial court never ruled on the motion, and Culbreath brought this appeal.

Numerous arguments are raised, and we first address Culbreath's contention that the trial court erred in not continuing the February 8 trial. A trial court may, upon motion and for good cause shown, continue any case previously set for trial. Ark. R. Civ. P. 40(b) (2006).

The granting or denial of the motion for continuance is a matter within the discretion of the trial court. *Dorothy v. Dorothy*, 88 Ark. App. 358, 199 S.W.3d 107 (2004).

Culbreath does not argue that he was unaware of the February 8 setting. Rather, he contends that car trouble prevented his appearance. The only evidence offered in support of this excuse was a bill from Dave's Auto Repair containing Culbreath's name and the date "2-8-06" but otherwise virtually illegible. Culbreath further avers that he called the circuit clerk's office to inform them of his delay and request a continuance. But there is no proof that anyone in the clerk's office received such a call. Finally, Culbreath claims in his brief that he was "only 30 minutes late" for the trial. However, the record does not indicate that he presented himself to the court that day.

Trial judges have an obligation to assure that their courts are conducted in an orderly and correct manner and that their courts are treated with respect and dignity. *Florence v. Taylor*, 325 Ark. 445, 928 S.W.2d 330 (1996). A litigant's failure to appear at trial without first obtaining a continuance may result in an adverse ruling against him. *See id.*; *see also White v. White*, 50 Ark. App. 240, 905 S.W.2d 485 (1995). The trial judge in this case may well have determined that Culbreath, although aware of the rescheduled trial setting, did not appear, did not request a continuance, and did not inform anyone why he could not attend. Moreover, it was not until March 3, 2006, that Culbreath filed a motion purporting to explain his absence. Under these circumstances, we decline to hold that the trial court abused its discretion in not continuing the February 8 trial.

Culbreath argues next that the trial court erroneously admitted hearsay evidence during Summerfield's testimony. However, Culbreath made no objection to the alleged hearsay during trial. In the absence of a contemporaneous objection to testimony, the issue is not preserved for appellate review. *See Callahan v. Clark*, 321 Ark. 376, 901 S.W.2d 842 (1995).

Next, Culbreath contends that he was not permitted to argue two motions to dismiss. Both motions alleged that Culbreath's son Jeff was the true owner of Southern Siding & Construction Company and that Culbreath was a mere employee. The second motion additionally objected to a request by Summerfield's counsel that Summerfield, having already testified, not be required to travel from out of state for the February 8 trial.

Culbreath has not shown a basis for reversal on this point. The record reflects that he began arguing his first motion to dismiss at the January 19 portion of the trial; however, the trial court, without objection by Culbreath, cut off the parties' arguments and said it would "hear the motion to dismiss as part of the proof in the case" and "ferret it all out at the same time." During trial, Culbreath, while cross-examining Summerfield, presented documentary evidence to support his claim that his son Jeff was the owner of the business. He was therefore able to submit proof in support of his argument, and no prejudice was suffered. Similarly, after his thorough cross-examination of Summerfield, the judge asked him if he had "anything else," and Culbreath answered, "No." It is therefore hard to see how he was prejudiced by Summerfield not attending the February 8 trial (especially since Culbreath

himself did not appear). We will not reverse absent a showing of prejudice. *See Taylor v. Hinkle*, 360 Ark. 121, 200 S.W.3d 387 (2004).

Finally, Culbreath presents a host of arguments that challenge the trial court's finding of breach and award of damages. Our standard of review on appeal from a bench trial is whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Chavers v. Epsco*, 352 Ark. 65, 98 S.W.3d 421 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id.* On appeal, we give deference to the superior position of the trial judge to determine the credibility of witnesses and the weight to be accorded their testimony. *Id.* Further, it is within the province of the trier of fact to resolve conflicts in the evidence. *See id.*

We first address Culbreath's contention that he should not have been held liable for breach because he was not the owner of Southern Siding & Construction Co. He points to a 2004 supplier's invoice and a 2002 bank statement reflecting his son Jeff as "d/b/a Southern Siding & Construction." However, there was evidence that it was Culbreath who drafted and signed the work proposal for Summerfield's home, endorsed the first draw check that Summerfield wrote, and requested additional money from Summerfield. There was also proof that all of Summerfield's important, initial contacts were with Culbreath and that Summerfield had no significant dealings with Jeff Culbreath until October 2004. It was the trial judge's province to resolve conflicts in the proof. *Chavers, supra*. We therefore cannot

say that the trial court clearly erred in determining that appellant Paul Culbreath was “d/b/a Southern Siding & Construction Co.”

Culbreath argues next that he in fact performed the work that he had contracted to do. However, Summerfield presented the trial court with photographs that were taken in December 2004, and these photographs, along with Summerfield’s testimony, depict not only the minuscule amount of work that was accomplished between August and December 2004 but the poor quality of the work that was done. Given this evidence, the trial court did not clearly err in finding that Culbreath failed to perform work for which he contracted.

Culbreath further contends that his performance was rendered impossible by Summerfield’s “actions and demands.” The burden of proving impossibility of performance, its nature, extent, and causative effect, rests upon the party alleging it; and in order to meet that burden he must show that he took virtually every action within his power to perform his duty under the contract. *See Frigillana v. Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979). This defense does not appear to have been raised below, but, in any event, there was evidence that Culbreath had months of opportunity to perform the contract but simply failed to do so, through no fault of Summerfield’s. We therefore see no basis for reversal on this point.

Next, Culbreath argues that it was Summerfield who first breached the contract by demanding excessive changes and by failing to pay the draws as agreed. However, according to Summerfield, Culbreath blamed his failure to perform on personal illness, not on changes in the contract. As for Summerfield’s alleged failure to pay the draws, the proof at trial

showed that he paid Culbreath \$2500 and \$1500 as demanded, despite the fact that, at the time he paid, no work had begun on the project.

Finally, Culbreath challenges the trial court's award of damages. He appears to argue that the court's award of \$7567.98 placed Summerfield in a better position than he would have been in had the contract been performed. To the contrary, Summerfield, according to his testimony, was out the \$4000 that he had already paid Culbreath (for which he received little, if any, usable work); approximately \$3400 in repair costs; and \$3567.98 over and above the contract price to complete the job. So, the evidence does not support Culbreath's claim that Summerfield received a windfall.

Culbreath also argues that the court's damage award did not conform to the actual cost of repairs and that Summerfield "presented no contractors as witnesses to testify as to the actual cost of any repairs." In fact, Summerfield gave a detailed accounting of his actual expenditures. Further, the trial court acted within its discretion in relying on damage testimony from Summerfield, who, as the homeowner, performed much of the additional work himself or paid others for work that he could not do. *See generally Bowman v. McFarlin*, 1 Ark. App. 235, 615 S.W.2d 383 (1981).

Various other allegations of error are scattered throughout Culbreath's briefs, but they are either not properly preserved, not fully developed, or not supported by convincing argument or authority. We therefore do not consider them.

Affirmed.

GLADWIN and BAKER, JJ., agree.